HARVARD
LAW REVIEW

VOL. XXVIII JUNE, 1915 NO. 8

LIABILITIES INCURRED IN THE ADMINISTRATION OF TRUSTS

IN the course of the administration of a trust, the trustee incurs a liability on a contract or in tort or otherwise to one other than the *cestui que trust.* It is the purpose of this article to consider the rights and remedies, legal and equitable, of the person to whom a liability is thus incurred.

In the absence of an express stipulation relieving him from liability,[1] a trustee is personally liable on contracts made by him for the benefit of the trust estate. He may be sued at law and execution may be levied upon his individual property. This is true whether he was acting without authority in incurring the liability, or whether he was acting in accordance with the directions of the will or deed of settlement or under the direction of the court.[2]

[1] The effect of such a stipulation is considered *infra*, p. 738.

[2] Duvall *v.* Craig, 2 Wheat. (U. S.) 45 (1817); Taylor *v.* Davis' Adm'r, 110 U. S. 330 (1884); Hall *v.* Jameson, 151 Cal. 606, 91 Pac. 518 (1907); Bradner Smith & Co. *v.* Williams, 178 Ill. 420, 53 N. E. 358 (1899); McGovern *v.* Bennett, 146 Mich. 558, 109 N. W. 1055 (1906); Koken Iron Works *v.* Kinealy, 86 Mo. App. 199 (1900); Blewitt *v.* Olin, 14 Daly (N. Y.) 351 (1888); Whalen *v.* Ruegamer, 123 N. Y. App. Div. 585, 108 N. Y. Supp. 38 (1908); Dunlevie *v.* Spangenberg, 66 N. Y. Misc. 354, 121 N. Y. Supp. 299 (1910); Mitchell *v.* Whitlock, 121 N. C. 166, 28 S. E. 292 (1897); Fehlinger *v.* Wood, 134 Pa. 517, 19 Atl. 746 (1890); Connally *v.* Lyons & Co., 82 Tex. 664, 18 S. E. 799 (1891); Wardwell *v.* Williamson, 72 Vt. 183, 47 Atl. 786 (1900). See a collection of authorities in 40 L. R. A. N. S. 201.

An executor or administrator who makes a contract for the benefit of the estate is likewise personally liable thereon. WILLIAMS, EXECUTORS, 10 ed., pp. 1417 *et seq.*; WOERNER, AMERICAN LAW OF ADMINISTRATION, 2 ed., §§ 328–356. In many of the cases hereinafter cited the liability was incurred by an executor.

Similarly, a trustee is personally liable for torts committed in the course of the administration of the trust. Thus he is personally liable for injuries resulting from the condition of the trust premises.[3] So, too, he is liable for injuries caused by the negligence of an agent employed by him in the course of the administration of the trust.[4] In employing an agent, the trustee is a principal and not a mere intermediate agent.[5] Other burdens also, resulting from his holding the title to the trust property, must be borne by the trustee. In the absence of a statutory provision exempting him from such liability, he is liable for unpaid subscriptions to corporate stock and is subject to the statutory liabilities imposed upon stockholders.[6] Statutes, however, generally expressly provide that trustees shall not be personally subject to liability as stockholders, but the estates or funds in their hands shall be liable.[7] Such statutes do not in general release from liability trustees who appear on the books of the company to be absolute owners of the stock.[8] Similarly a trustee is liable for taxes.[9]

[3] Everett *v.* Foley, 132 Ill. App. 438 (1907); O'Malley *v.* Gerth, 67 N. J. L. 610, 52 Atl. 563 (1902); Keating *v.* Stevenson, 21 N. Y. App. Div. 604, 47 N. Y. Supp. 847 (1897) (*semble*); Boyd *v.* U. S. Mortgage & Trust Co., 84 N. Y. App. Div. 466, 82 N. Y. Supp. 1001 (1903) (*semble*); Moniot *v.* Jackson, 40 N. Y. Misc. 197, 81 N. Y. Supp. 688 (1903) (*semble*); Gillick *v.* Jackson, 40 N. Y. Misc. 627, 83 N. Y. Supp. 29 (1903).

[4] Ballou *v.* Farnum, 9 Allen (Mass.) 47 (1864); Baker *v.* Tibbetts, 162 Mass. 468, 39 N. E. 350 (1895); Parmenter *v.* Barstow, 22 R. I. 245, 47 Atl. 365 (1900) (*semble*); Sprague *v.* Smith, 29 Vt. 421 (1857) (*semble*); O'Toole *v.* Faulkner, 29 Wash. 544, 70 Pac. 58 (1902).

[5] Baker *v.* Tibbetts, 162 Mass. 468, 39 N. E 350 (1895); O'Toole *v.* Faulkner, 29 Wash. 544, 70 Pac. 58 (1902). An intermediate agent is not liable for the acts of a sub-agent. Stone *v.* Cartwright, 6 T. R. 411 (1795).

[6] 1 COOK, CORPORATIONS, 7 ed., §§ 245–246; 1 MACHEN, CORPORATIONS, § 767. The rule is the same as to stock in joint-stock companies. Mitchell's Case, L. R. 9 Eq. 363 (1870); *In re* Moseley Green Coal & Coke Co., Ltd., 4 DeG., J. & S. 416 (1864); Muir *v.* City of Glasgow Bank, 4 App. Cas. 337 (1879).

[7] LORING, TRUSTEE'S HANDBOOK, 27. See, for example, U. S. REV. STATS., § 5152, providing that "Persons holding stock as executors, administrators, guardians, or trustees shall not be personally subject to any liability as stockholders; but the estates and funds in their hands shall be liable in like manner and to the same extent as the testator, intestate, ward, or person interested in such trust-funds would be, if living and competent to act and hold the stock in his own name."

[8] 1 MACHEN, CORPORATIONS, § 769; Sherwood *v.* Illinois Tr. & Sav. Bank, 195 Ill. 112, 62 N. E. 835 (1902); Converse *v.* Paret, 228 Pa. 156, 77 Atl. 429 (1910). But see Burgess *v.* Seligman, 107 U. S. 20 (1882).

[9] LaTrobe *v.* Mayor, etc. of Baltimore, 19 Md. 13 (1862); AMES, CASES ON TRUSTS, 2 ed., 279. By statute, taxes are sometimes payable at the place of residence of the

When the trustee has discharged a liability incurred in the due course of the administration of the trust, ordinarily he has a right to be reimbursed.[10] If, however, he was not authorized to incur the liability, he has generally no right to reimbursement.[11] Thus, if an executor, or trustee, carries on the business of the testator without authority, he has no right to reimbursement for discharging liabilities in contract or in tort incurred in carrying on the business.[12] But where the trustee has acted in good faith and has in fact enriched the trust estate, he is sometimes allowed reimbursement, not for the full amount he has expended, but for the amount by which the estate has been enriched.[13] So, too, he has no right to reimbursement if he incurs and discharges a liability for a tort which is the result of his own neglect or wilful wrong and for which he is therefore personally to blame; but he has a right to reimbursement if he was not personally to blame for the commission of the tort.[14] If the trustee has misappropriated assets of the trust estate or has in any other manner committed a breach of trust, so that he is indebted to the estate, his liability to the estate may be set off against his claim for reimbursement.

Normally, the trustee is reimbursed out of the income from the trust estate. In rendering his accounts, he credits himself with the expenditures he has made, and he is not bound to pay over any of the income to the *cestui que trust* until he has been reimbursed. He pays over only the net income. Where the income, however, is not sufficient, he may have reimbursement from the *corpus* of the trust estate. He is not bound to surrender the estate until his claims are satisfied. He has, in other words, a right to reimbursement, and a lien on both the income and the *corpus* of the trust estate to secure that right.[15] His claim therefore takes

cestui que trust and, when the trustee is a non-resident, payable by the *cestui que trust.* See Watson *v.* Boston, 209 Mass. 18, 95 N. E. 302 (1911).

[10] POMEROY, EQUITY JURISPRUDENCE, 3 ed., § 1085.

[11] Winslow *v.* Young, 94 Me. 145, 47 Atl. 149 (1900); Loud *v.* Winchester, 64 Mich. 23, 30 N. W. 896 (1897).

[12] Lucht *v.* Behrens, 28 Oh. St. 231 (1876); Parry's Estate, 244 Pa. 93, 90 Atl. 443 (1914).

[13] *Ex parte* Chippendale, 4 DeG., M. & G. 19 (1853).

[14] Benett *v.* Wyndham, 4 DeG., F. & J. 259 (1862); *In re* Raybould, [1900] 1 Ch. 199; *In re* Hunter, 151 Fed. 904 (1907).

[15] LEWIN, TRUSTS, 12 ed., 795; Stott *v.* Milne, 25 Ch. Div. 710 (1884); Livingston

precedence over the claims of the *cestui que trust* and of the creditors of the *cestui que trust* against the trust estate.[16]

The trustee may at the time of the creation of the trust agree with the settlor to forego the right to reimbursement.[17] If the settlor shows an intention to subject a part only of the trust estate to the risk of loss and the trustee accepts the trust under such circumstances he is precluded from claiming reimbursement out of any other assets. Thus it has been held that if a testator leaves a business to his executor or trustee and directs that it be carried on, he presumptively shows an intention to subject to the risk of loss only the assets already employed in the business, and the executor or trustee has no right to reimbursement from any other assets.[18] But this presumption is overcome when the language of the will evinces an intention to subject the whole estate of the testator to the risk of loss.[19]

If the trust estate is insufficient to reimburse the trustee who has discharged a liability properly incurred in the administration of the trust, may the trustee obtain his reimbursement from the *cestui que trust* personally? In a number of cases it has been held that he may. When the settlor is himself the *cestui que trust* a contract to reimburse the trustee may easily be spelled out; from the request to the trustee to act as such and to incur liabilities as such, a promise to reimburse him may naturally be inferred.[20] But the decisions have gone further and have allowed the trustee reimbursement from the *cestui que trust* personally, even where

---

v. Newkirk, 3 Johns. Ch. (N. Y.) 312 (1818); Woodard *v.* Wright, 82 Cal. 202, 22 Pac. 1118 (1889); Perrine *v.* Newell, 49 N. J. Eq. 57, 23 Atl. 492 (1892).

[16] Williams *v.* Allen, 32 Beav. 650 (1863); *In re* The Exhall Coal Co., 35 Beav. 449 (1866); Dodds *v.* Tuke, 25 Ch. Div. 617 (1884); Perrine *v.* Newell, 49 N. J. Eq. 57, 23 Atl. 492 (1892).

[17] Gillan *v.* Morrison, 1 DeG. & Sm. 421 (1847). See *Ex parte* Chippendale, 4 DeG., M. & G. 19, 52 (1853).

[18] *Ex parte* Garland, 10 Ves. 110 (1804); Burwell *v.* Mandeville's Ex'r, 2 How. (U. S.) 560 (1844); Smith *v.* Ayer, 101 U. S. 320 (1879); Fridenburg *v.* Wilson, 20 Fla. 359 (1883); Wilson *v.* Fridenburg, 21 Fla. 386 (1885). *Cf.* M'Neillie *v.* Acton, 4 DeG., M. & G. 774 (1853); Lucht *v.* Behrens, 28 Oh. St. 231 (1876).

[19] Blodgett *v.* American National Bank, 49 Conn. 8 (1881); Moore *v.* McFall, 263 Ill. 596, 105 N. E. 723 (1914); Willis *v.* Sharp, 113 N. Y. 586, 21 N. E. 705 (1889); Davis *v.* Christian, 15 Gratt. (Va.) 11 (1859).

[20] Balsh *v.* Hyham, 2 P. Wms. 453 (1728); Phené *v.* Gillan, 5 Hare 1 (1845); *Ex parte* Chippendale, 4 DeG., M. & G. 19 (1853). See Fraser *v.* Murdoch, 6 App. Cas. 855 (1881).

the latter is not the settlor, and where it would be impossible to spell out any contract.[21] In *Hardoon* v. *Belilios*[22] a firm of stock-brokers placed certain shares, not fully paid, in the name of the plaintiff, their employee. The brokers subsequently assigned their beneficial interest in the stock to a syndicate which transferred its interest to the defendant. The plaintiff requested the defendant to take the shares out of the plaintiff's name, but the defendant refused. The corporation became insolvent and the plaintiff was compelled to pay several calls on the stock, and brought suit against the defendant to recover the sums he had thus been obliged to pay. The trial court non-suited the plaintiff. It was held by the Judicial Committee of the Privy Council that the non-suit was improper. The court said:

"The plainest principles of justice require that the *cestui que trust* who gets all the benefit of the property should bear its burdens unless he can show some good reason why his trustee should bear them himself. The obligation is equitable and not legal, and the legal decisions negativing it, unless there is some contract or custom imposing the obligation, are wholly irrelevant and beside the mark. Even where trust property is settled on tenants for life and children, the right of their trustee to be indemnified out of the whole trust estate against any liabilities arising out of any part of it is clear and indisputable. . . . Where the only *cestui que trust* is a person *sui juris*, the right of the trustee to indemnity by him against liabilities incurred by the trustee by his retention of the trust property has never been limited to the trust property; it extends further, and imposes upon the *cestui que trust* a personal obligation enforceable in equity to indemnify his trustee."

This obligation of the *cestui que trust* to reimburse the trustee is one arising on equitable principles out of the relationship between the parties. The profits, if any, go to the *cestui que trust;* the losses, if any, should be borne by him rather than by the trustee, provided the trustee was not to blame for causing the losses. The obligation of the *cestui que trust* to reimburse the trustee is analogous to the obligation of a principal to reimburse his agent, and bears some resemblance to the obligation of a principal to reimburse his surety, although it is held that the obligation of the

[21] Hardoon *v.* Belilios, [1901] A. C. 118.

[22] [1901] A. C. 118.

cestui que trust is not enforceable in an action at law.[23] If there are several *cestuis que trust*, their personal obligation to reimburse the trustee is enforced against them in proportion to their respective interests in the trust estate.[24]

Of course no one can be made a *cestui que trust* against his will, and if the intended *cestui que trust* disclaims, he cannot be held personally liable;[25] but if he accepts the beneficial interest, he cannot, by an assignment, terminate his obligation to indemnify the trustee against claims arising, even though not maturing, while he holds the beneficial interest.[26] One who is not *sui juris* cannot be subjected to any personal liability by virtue of his ownership of the beneficial interest.[27] It has been held that the trustees of an unincorporated club have no right to reimbursement from the members of the club.[28] The reason given by the court was that a club is not an association for gain and that it would be contrary to the understanding of all concerned if the members were to be held to liability beyond the payment of their dues. Doubtless the parties do not contemplate profit or loss; but if there is any profit, it goes to the members and not to the trustees. And why should not the trustees, if they have acted properly in incurring a loss, shift that loss to those for whose benefit they were acting?

As has been shown, the trustee has a right, after he has discharged a liability properly incurred in the administration of the trust, to be reimbursed therefor. But he has a better right than this. He has a right of exoneration, — a right not to be compelled to discharge such a liability out of his own private property.[29] In the case of *In re* Blundell,[30] the court, Stirling, J., said:

---

[23] Sayles *v.* Blane, 14 Q. B. 205 (1849). Similarly, a trustee cannot bring an action at law against the *cestui que trust* for compensation for his services. Hazard *v.* Coyle, 26 R. I. 361, 58 Atl. 987 (1904).

[24] Matthews *v.* Ruggles-Brise, [1911] 1 Ch. 194.

[25] Hardoon *v.* Belilios, [1901] A. C. 118, 123 (*semble*).

[26] Matthews *v.* Ruggles-Brise, [1911] 1 Ch. 194.

[27] Hardoon *v.* Belilios, [1901] A. C. 118, 127 (*semble*).

[28] Wise *v.* Perpetual Trustee Company, Ltd., [1903] A. C. 139. See 3 COL. L. REV. 407; 17 HARV. L. REV. 141; 19 L. QUART. REV. 386. *Cf.* Stikeman *v.* Flach, 175 N. Y. 512, 67 N. E. 1090 (1903), reversing S. C., 58 N. Y. App. Div. 277, 68 N. Y. Supp. 1011 (1901). The trustees are entitled to a reimbursement from the club property. Minnitt *v.* Lord Talbot, L. R. Ir. 1 Ch. 143 (1876).

[29] *In re* National Financial Co., L. R. 3 Ch. 791 (1868); Hobbs *v.* Wayet, 36 Ch. Div. 256 (1887). See also *In re* Richardson, [1911] 2 K. B. 705.

[30] 40 Ch. Div. 370 (1888).

"What is the right of indemnity? I apprehend that in equity, at all events, it is not a right of the trustee to be indemnified only after he has made necessary payments . . . but that he is entitled to be indemnified, not merely against the payments actually made, but against his liability. . . . It seems to me, therefore, that a trustee has a right to resort in the first instance to the trust estate to enable him to make the necessary payments to the persons whom he employs to assist him in the administration of the trust estate; that he is not bound in the first instance to pay those persons out of his own pocket, and then recoup himself out of the trust estate, but that he can properly in the first instance resort to the trust estate, and pay those persons whom he has properly employed the proper remuneration out of the trust estate."

He may apply the trust income to the discharge of such a liability. He may use the principal of the trust fund in discharging the liability; he may, if authorized by the will, sell or mortgage a part or the whole of the *corpus* to raise funds wherewith to discharge the liability; or, if not so authorized by the will, he may generally obtain an order from the court giving him such authority; and certainly, he will not be compelled to turn over the estate to the *cestui que trust* while outstanding obligations properly incurred by him as trustee are unsatisfied. He may, indeed, in cases where he is entitled to reimbursement by the *cestui que trust* personally for liabilities discharged, bring a bill in equity to compel the *cestui que trust* himself to discharge such liabilities.[31] An agent or a surety has a similar right to exoneration which equity will specifically enforce. Similarly, equity will specifically enforce a contract to indemnify. It is immaterial that the trustee is insolvent; he still has a right to be exonerated. If the trustee has died insolvent, his executor may compel the *cestui que trust* to pay the creditor the whole amount of his claim, and not merely the amount of the dividend which the creditor could get out of the trustee's estate.[32]

It is clear, then, that the creditor has a right against the trustee, and that the trustee has a right against the trust estate and, in some cases, against the *cestui que trust* personally. Has the creditor himself any right against the trust estate or the *cestui que trust?*

The right of the trustee to exoneration is an asset of the trus-

---

[31] Cruse *v.* Paine, L. R. 6 Eq. 641, L. R. 4 Ch. 441 (1869); Lacey *v.* Hill, L. R. 18 Eq. 182 (1874).

[32] Cruse *v.* Paine, L. R. 6 Eq. 641, L. R. 4 Ch. 441 (1869).

tee's. The creditor may, by a bill in equity, reach this asset and compel the application of it to his claim against the trustee.[33] Tort creditors, as well as contract creditors, may in this way reach the trust estate.[34] In most jurisdictions such a suit does not lie where the debtor has assets which can be reached at law.[35] In some cases it is held that the creditor must first obtain judgment against the debtor and have the execution writ returned *nulla bona* before he can bring a bill for equitable execution.[36] But equity should not compel the creditor to do a useless thing, and should allow him to sue in equity to reach the debtor's equitable assets without having first obtained a judgment at law against the debtor, where the debtor has no assets which could be reached by execution at law.[37] If the trustee resides outside the jurisdiction and has no property within the jurisdiction, it has been held that the creditor may reach and apply the trustee's right to exoneration; the legal remedy against the trustee in such cases is as inadequate as in the case where he is insolvent.[38] The creditor can probably, also, when the trustee is insolvent or a non-resident without property in the jurisdiction, reach the trustee's right to be exonerated by the *cestui que trust* personally.[39]

---

[33] Fairland *v.* Percy, L. R. 3 P. & D. 217 (1875); *In re* Pumfrey, 22 Ch. Div. 255 (1882); Moore *v.* M'Glynn, [1904] 1 I. R. 334; Mason *v.* Pomeroy, 151 Mass. 164, 24 N. E. 202 (1890); King *v.* Stowell, 211 Mass. 246, 98 N. E. 91 (1912); Laible *v.* Ferry, 32 N. J. Eq. 791 (1880); Paul *v.* Wilson, 79 N. J. Eq. 204, 81 Atl. 835 (1911); Wells-Stone Mercantile Co. *v.* Aultman, Miller & Co., 9 N. D. 520, 84 N. W. 375 (1900); Cater *v.* Eveleigh, 4 Desaus. Eq. (S. C.) 19 (1809); Braun *v.* Braun, 14 Manitoba 346 (1902).

In Strickland *v.* Symons, 26 Ch. Div. 245 (1884), the court said that the creditor could not reach the trust estate unless the object of the trust was the carrying on of a business. But this seems wrong on principle, and inconsistent with the later English case of *In re* Richardson, [1911] 2 K. B. 705, stated *infra*, p. 733.

[34] *In re* Raybould, [1900] 1 Ch. 199; *In re* Hunter, 151 Fed. 904 (1907); Miller *v.* Smythe, 92 Ga. 154, 18 S. E. 46 (1893).

[35] Owen *v.* Delamere, L. R. 15 Eq. 134 (1872); Dantzler *v.* McInnis, 151 Ala. 293, 44 So. 193 (1907) (*semble*); Johnson *v.* Leman, 131 Ill. 609, 23 N. E. 435 (1890); Stern Bros. *v.* Hampton, 72 Miss. 555 (1895).

[36] Blackshear *v.* Burke, 74 Ala. 239 (1883). See Henshaw *v.* Freer, 1 Bailey Eq. (S. C.) 311 (1831).

[37] In Massachusetts it is not necessary even to show that the trustee is insolvent. Mason *v.* Pomeroy, 151 Mass. 164, 24 N. E. 202 (1890); King *v.* Stowell, 211 Mass. 246, 98 N. E. 91 (1912) (*semble*).

[38] Gates *v.* McClenahan, 124 Ia. 593, 100 N. W. 479 (1904); Norton *v.* Phelps, 54 Miss. 467 (1877); Field *v.* Wilbur, 49 Vt. 157 (1876).

[39] In Poland *v.* Beal, 192 Mass. 559, 78 N. E. 728 (1906), the *cestuis que trust* ex-

The right of the trustee to exoneration from liability for a debt properly incurred by him in the administration of the trust cannot be reached by the personal creditors of the trustee. In the case of *In re Richardson*,[40] a leasehold estate was held in trust. At the expiration of the lease the landlord sued the trustee and obtained judgment against him for £711 for rent and damages for breach of covenant. Before the amount was ascertained the trustee was adjudicated a bankrupt. The landlord, by leave of the court, — the question of the ultimate disposition of the fund being reserved, — brought an action against the *cestui que trust* in the joint names of the landlord and the trustee in bankruptcy for a declaration that the *cestui que trust* was bound to indemnify the bankrupt against the £711, and for an order for payment of this sum. The action was compromised, the *cestui que trust* paying £520 to the landlord. An application to the judge in bankruptcy was then made by the landlord to determine who was entitled to the money so recovered. The judge held that it formed a part of the bankrupt's estate and was divisible among his creditors, and ordered the landlord to hand over the money to the trustee in bankruptcy. The landlord appealed and it was held by the Court of Appeal that the appeal should be allowed. In the course of the decision, Buckley, L. J., said:

"This is an obligation to indemnify. How can effect be given to an obligation to indemnify? Only in one of three ways. If B. [the trustee] has paid the money to A. [the creditor], he may get it back from C. [the *cestui que trust*] and may put it into his pocket. If B. has not paid the money to A., but calls on C. to pay the money to A., then if C. pays the money to A., B. is never out of pocket at all. In either of those cases B. is indemnified. But lastly, if B. has not paid the money to A. but calls upon C. to pay the money to him, B., in order that he may pay it to A., then B. is not indemnified if the money is paid, not to A. alone, but to A. and others."

---

pressly promised the trustee to furnish money to pay for certain property which they requested him to purchase for the benefit of the trust estate. It was held that the person from whom the property was purchased by the trustee could maintain a bill in equity against the *cestuis que trust*. The creditor is here by equitable execution reaching a right to exoneration arising out of an express contract. See an article on "Contracts for the Benefit of a Third Person," by Professor Williston, in 15 HARV. L. REV. 767, 775. The result should be the same when the right to exoneration arises, not out of an express contract, but out of the relationship of the parties.

[40] [1911] 2 K. B. 705.

The decision seems clearly right. The asset of the trustee is not a right to receive money; it is a right to be saved harmless, to be exonerated by having his liability to the creditor discharged. The obligation of the *cestui que trust* is an equitable obligation, and equity acts specifically. The specific enforcement of the obligation results in payment to the trust creditor, not to the trustee or his private creditors. If the *cestui que trust* should, instead of paying the creditor, put the trustee in funds in order that he might pay the creditor, the trustee would have no right to use the funds in paying his private creditors. In no case, therefore, where the trustee has not paid the trust creditor, can his private creditors reach the trust estate or the *cestui que trust*.[41] Any other result would clearly allow the private creditors of the trustee to make a profit out of the trust. The situation is quite different where the trustee out of his private assets has paid the creditor. His right to reimbursement which arises thereby is a right which any of his private creditors can reach, just as they could have reached those assets if they had moved in time.[42]

If a testator bequeathes a business to a trustee and directs that he continue to carry it on, the testator's creditors may insist, nevertheless, that the business be not carried on, but that it be wound up and that their claims be paid from the proceeds. If the trustee continues the business without their consent, they may insist on being paid out of the assets so bequeathed, in priority to the claims of persons to whom liabilities have been incurred by the trustee in carrying on the business after the testator's death;[43] for debts take precedence over legacies. But if the testator's creditors have consented to the carrying on of the business, they consent to the postponement of their claims to the trustee's right of reimbursement or exoneration; and the creditors whose claims arose after the testator's death and are against the trustee, by proceeding through the trustee's rights of exoneration, obtain priority

---

[41] Askew *v.* Myrick, 54 Ala. 30 (1875) (*semble*); First National Bank *v.* Thompson, 61 N. J. Eq. 188, 48 Atl. 333 (1901) (*semble*). Compare the remarks of Professor Williston as to the right of a creditor on a promise by a third person to the debtor to pay the debt, in 15 HARV. L. REV. 777.

[42] See Mannix *v.* Purcell, 46 Oh. St. 102, 19 N. E. 572 (1888).

[43] *Re* Millard, 72 L. T. N. S. 823 (1895); Willis *v.* Sharp, 115 N. Y. 396, 22 N. E. 149 (1889) (*semble*); Morrow *v.* Morrow, 2 Tenn. Ch. 549 (1875).

over the testator's creditors.[44] When a business is carried on by an executor for a short time until it can be sold as a going concern, whether the testator's creditors have consented or not, the executor has a right of indemnity for liabilities incurred by him, and is entitled to priority over the testator's creditors; and through the executor's right, the persons to whom he has incurred such liabilities have priority over the testator's creditors.[45]

This derivative right of the creditor against the *cestui que trust* and the trust estate, through the trustee, is available only when and to the extent that the trustee has a right to exoneration. When the liability was not properly incurred by the trustee in the administration of the trust, the trustee has usually no right to exoneration and the creditor has no right through him against the estate;[46] but where the trustee acted in good faith and did benefit the estate, he has a right to exoneration to the extent of the value of the benefit, and to that extent the creditor can recover against the estate.[47] Where the trustee has a right to exoneration only out of a part of the trust estate, the creditor can reach only that part of the estate.[48] If the trustee is in default to the estate, his claim to exoneration, like his claim to reimbursement, is reduced by the amount that he is indebted to the estate, and the creditor's right against the estate is reduced accordingly; and if the amount of the trustee's indebtedness exceeds the amount of the creditor's

---

[44] *Ex parte* Garland, 10 Ves. 110 (1804); Dowse *v.* Gorton, [1891] A. C. 190; *In re* Hodges, [1899] 1 I. R. 480 (1899); *In re* Frith, [1902] 1 Ch. 342.

[45] Wright *v.* Beatty, 2 Alberta 89 (1909).

[46] Farmers' & Traders' Bank *v.* Fidelity & Deposit Co., 108 Ky. 384, 56 S. W. 571 (1900); Bauerle *v.* Long, 187 Ill. 475, 58 N. E. 458 (1900); Lucht *v.* Behrens, 28 Oh. St. 231 (1876); Tuttle *v.* First Nat. Bank, 187 Mass. 533, 73 N. E. 560 (1905); Dunham *v.* Blood, 207 Mass. 512, 93 N. E. 804 (1911); Welsh *v.* Davis, 3 S. C. 110 (1871).

[47] Thomas *v.* Provident Life & Trust Co., 138 Fed. 348 (1905); Deery *v.* Hamilton, 41 Ia. 16 (1875); *In re* Estate of Manning, 134 Ia. 165, 111 N. W. 409 (1907); De Concillio *v.* Brownrigg, 51 N. J. Eq. 532, 25 Atl. 383 (1893); Stillman *v.* Holmes, 9 Oh. N. P. N. S. 193 (1909). But see Hallock *v.* Smith, 50 Conn. 127 (1882). For the Scotch law, see MENZIES, TRUSTEES, 2 ed., 227.

[48] *Ex parte* Richardson, 3 Madd. 138 (1818); *Ex parte* Garland, 10 Ves. 110 (1804); Cutbush *v.* Cutbush, 1 Beav. 184 (1839); Burwell *v.* Mandeville's Ex'r, 2 How. (U. S.) 560 (1844); Pitkin *v.* Pitkin, 7 Conn. 307 (1829) (*semble*); Wilson *v.* Fridenburg, 21 Fla. 368 (1885); Laible *v.* Ferry, 32 N. J. Eq. 791 (1880); Willis *v.* Sharp, 113 N. Y. 586, 21 N. E. 705 (1889) (*semble*); Lucht *v.* Behrens, 28 Oh. St. 231 (1876).

claim, the creditor cannot hold the trust estate at all.[49] If there are two trustees, and one is in default but the other is not, and is not in any way responsible for the default, the latter is entitled to exoneration and the creditor can reach the trust estate through his right to exoneration.[50]

Is the creditor without remedy where the trustee is insolvent and has no right to exoneration? Is his only right against the *cestui que trust* or the trust estate a derivative right, a right existing only when and to the extent that the trustee has a right to exoneration? Does he ever have any direct right against the *cestui que trust* or the trust estate?

Nothing is better settled than that the trustee is not an agent of the *cestui que trust.* Where the fact that the trustee was contracting for the estate was known to the third party, the *cestui que trust* cannot be held as a principal.[51] Where the fact that the trustee was contracting for the estate was not known to the third party, the *cestui que trust* cannot be held as an undisclosed principal.[52] Similarly it is well settled that the *cestui que trust* is not liable, as principal, for the torts of the trustee, committed in the course of the administration of the trust.[53] Similarly the *cestui que trust* is not liable for unpaid subscriptions to stock; nor is he subject to statutory liability thereon.[54] One in whom title to property is vested may, however, be an agent. The person holding the legal title for another is always, in the broad sense of the term, a trustee of the property so held; but he is in addition an agent, when he

---

[49] *In re* Johnson, 15 Ch. Div. 548 (1880); *In re* Evans, 34 Ch. Div. 597 (1887); *In re* British Power, etc. Co., [1910] 2 Ch. 470; *In re* Morris, 23 L. R. Ir. 333; Hewitt *v.* Phelps, 105 U. S. 393 (1881); Mason *v.* Pomeroy, 151 Mass. 164, 24 N. E. 202 (1890) (*semble*); King *v.* Stowell, 211 Mass. 249, 98 N. E. 91 (1912) (*semble*); Clopton *v.* Gholson, 53 Miss. 466 (1876); Norton *v.* Phelps, 54 Miss. 467 (1877) (*semble*); Wilson *v.* Fridenburg, 21 Fla. 386 (1885); Dantzler *v.* McInnis, 151 Ala. 293, 44 So. 193 (1907) (*semble*); Wells-Stone Mercantile Co. *v.* Aultman, Miller & Co., 9 N. D. 520, 84 N. W. 375 (1900) (*semble*).

[50] *In re* Frith, [1902] 1 Ch. 342.

[51] Taylor *v.* Davis' Adm'r, 110 U. S. 330 (1884) (*semble*); Dantzler *v.* McInnis, 151 Ala. 293, 44 So. 193 (1907) (*semble*); Truesdale *v.* Philadelphia, etc. Ins. Co., 63 Minn. 49, 65 N. W. 133 (1895); Wells-Stone Mercantile Co. *v.* Grover, 7 N. D. 460, 75 N. W. 911 (1898); Manhattan Oil Co. *v.* Gill, 118 N. Y. App. Div. 17, 103 N. Y. Supp. 364 (1907); Gates *v.* Avery, 112 Wis. 271, 87 N. W. 1091 (1901).

[52] Everett *v.* Drew, 129 Mass. 150 (1880).

[53] Falardeau *v.* Boston Art Students' Ass'n, 182 Mass. 405, 65 N. E. 797 (1903).

[54] AMES, CASES ON TRUSTS, 2 ed., 279.

acts under the supervision and control of the person for whom he holds the property. If he is an agent of the beneficial owner of the property, the latter may be held on contracts and for torts, as principal.[55] If there are several beneficial owners and a business is carried on under their supervision, they may be liable as partners.[56] But it is universally agreed that a trustee as such is not an agent of the *cestui que trust* and cannot render the *cestui que trust* personally liable as a principal, either at law or in equity. The *cestui que trust* personally can be reached by the creditor only indirectly, only when and to the extent that the trustee has a right of exoneration. Has the creditor ever any direct right against the trust estate?

The creditor may, as has been said, sue the trustee at law and obtain a judgment against him personally, and levy on his individual property. But he cannot, any more than an individual creditor of the trustee, levy on the trust estate.[57] Moreover, he cannot sue the trustee "as trustee" in an action at law and levy on the trust estate.[58] The common-law rule is that, although an executor is liable "as executor" in an action at law, when sued on an obligation created by the testator, a trustee is not liable in an action at law "as trustee." The only judgment at law against a trustee is *de bonis propriis*.[59] According to the common-law rule, the words "as trustee" in the writ and declaration are treated as

[55] So when one holds stock under the direction and control of another, the latter is liable as the "real owner" of the stock. 1 COOK, CORPORATIONS, 7 ed., § 249; 1 MACHEN, CORPORATIONS, § 767; Ohio Valley Nat. Bank *v.* Hulitt, 204 U. S. 162 (1907).

[56] Frost *v.* Thompson, 219 Mass. 360, 106 N. E. 1009 (1914); Wright *v.* Railroad, 151 N. C. 529, 66 S. E. 588 (1909). See Williams *v.* Milton, 215 Mass. 1, 102 N. E. 355 (1913), and cases therein cited.

[57] Jennings *v.* Mather, [1902] 1 K. B. 1; Zehnbar *v.* Spillman, 25 Fla. 591, 6 So. 214 (1889); Hussey *v.* Arnold, 185 Mass. 202, 70 N. E. 87 (1904); Moore *v.* Stemmons, 119 Mo. App. 162, 95 S. W. 313 (1906); O'Brien *v.* Jackson, 167 N. Y. 31, 60 N. E. 238 (1901).

[58] O'Brien *v.* Jackson, 167 N. Y. 31, 60 N. E. 238 (1901). *Cf.* Bauerle *v.* Long, 187 Ill. 475, 58 N. E. 458 (1900).

In Georgia by statute the trust estate may be reached in an action at law. GA. CODE (1911), § 3786; Greenfield *v.* Vason, 74 Ga. 126 (1884); Sanders *v.* Houston, etc. Co., 107 Ga. 49, 32 S. E. 610 (1899); Cottingham *v.* Equitable, etc. Co., 114 Ga. 940, 41 S. E. 72 (1902). See also ALA. CODE (1907), § 6085; CONN. GEN. STATS. (1902), § 739.

[59] DuVall *v.* Craig, 2 Wheat. (U. S.) 45 (1817); Brackett *v.* Ostrander, 126 N. Y. App. Div. 529, 110 N. Y. Supp. 779 (1908).

surplusage and the action proceeds against the trustee personally.[60] It would be unfair to the *cestui que trust* to deprive him of his beneficial interest in the trust estate without an opportunity to be heard. Whether or not the trustee properly incurred the debt, and whether or not he has a right to indemnity, the trust estate cannot be reached by the creditor in an action at law. Can the creditor ever, except through the trustee's right of exoneration, reach the trust estate by a suit in equity?

The trustee may be authorized, by the will or other instrument creating the trust, to incur the indebtedness and to mortgage or pledge the trust estate or a part of it as security therefor. If he does create a mortgage or pledge, undoubtedly the creditor may enforce it, and that, too, whether or not the trustee is insolvent, and regardless of the state of the account between the trustee and the *cestui que trust*.[61] The result is the same where the court has power to and does authorize a mortgage or pledge of the estate.[62]

It is held in a number of cases that if the trustee is unwilling to make himself liable, he may contract in such a way as to exclude personal liability. If he signs the contract "T, trustee," or "T, as trustee for the X estate," or even in the name of the "X estate by T, trustee," he is held personally liable, the words showing his trusteeship being treated merely as *descriptio personae*.[63] But if

---

[60] Hampton *v.* Foster, 127 Fed. 468 (1904); Odd Fellows' Hall Ass'n *v.* McAllister, 153 Mass. 292, 26 N. E. 862 (1891). In some jurisdictions the words "as trustee" in the writ or declaration are not treated as surplusage; and if the trustee is liable only personally a suit against him "as trustee" will be dismissed. O'Brien *v.* Jackson, 167 N. Y. 31, 60 N. E. 238 (1901); Scheibeler *v.* Albee, 114 N. Y. App. Div. 146, 99 N. Y. Supp. 706 (1906); Parmenter *v.* Barstow, 22 R. I. 245, 47 Atl. 365 (1900).

[61] Gilbert *v.* Penfield, 124 Cal. 234, 56 Pac. 1107 (1899); Iowa L. & T. Co. *v.* Holderbaum, 86 Ia. 1, 52 N. W. 550 (1892); Roberts *v.* Hale, 124 Ia. 296, 99 N. W. 1075 (1904); Packard *v.* Kingman, 109 Mich. 497, 67 N. W. 551 (1896); New York Life Ins. & T. Co. *v.* Conkling, 159 N. Y. App. Div. 337, 144 N. Y. Supp. 638 (1913).

[62] *In re* Bellinger, [1898] 2 Ch. 534; Neill *v.* Neill, [1904] 1 I. R. 513; Townsend *v.* Wilson, 77 Conn. 411, 59 Atl. 417 (1904); Warren *v.* Pazolt, 203 Mass. 328, 89 N. E. 381 (1909).

As to the power of a trustee to mortgage or pledge, see Smith *v.* Ayer, 101 U. S. 320 (1879); Tuttle *v.* First Nat. Bank, 187 Mass. 533, 73 N. E. 560 (1905); Gibney *v.* Allen, 156 Mich. 301, 120 N. W. 811 (1909); First Nat. Bank *v.* Nat. Broadway Bank, 156 N. Y. 459, 51 N. E. 398 (1898); PERRY, TRUSTS, 6 ed., § 768.

[63] Muir *v.* City of Glasgow Bank, 4 App. Cas. 337 (1879); Duvall *v.* Craig, 2 Wheat. (U. S.) 45 (1817); Taylor *v.* Davis' Adm'r, 110 U. S. 330 (1884); Hall *v.* Jameson, 151 Cal. 606, 91 Pac. 518 (1907); Tucker Mfg. Co. *v.* Fairbanks, 98 Mass. 101 (1867); Rosenthal *v.* Schwartz, 214 Mass. 341, 101 N. E. 1070 (1913); McGovern *v.* Bennett,

he signs "as trustee but not individually," or "as trustee but not otherwise," then he is not personally liable.[64] In a recent English case it was said that if he is not bound, no one is bound, and it was held, therefore, that the provision that the trustee should not be personally liable was repugnant and void.[65] But this view was later disapproved,[66] and in this country it has been held that effect should be given to the provision and that the trustee is not personally liable.[67] In such case, is the estate liable? Such a contract, it is held, creates a charge on the trust estate enforceable in equity by the creditor against the trust estate. To the extent that the trustee has power to incur the debt he has power to charge the estate therefor.[68] Since the claim of the creditor on such a contract is a claim directly against the trust estate, and not merely a right to proceed through the trustee, it is immaterial whether the trustee is indebted to the estate or not. To give the creditor a

---

146 Mich. 558, 109 N. W. 1055 (1906); Koken Iron Works *v.* Kinealy, 86 Mo. App. 199 (1900); Germania Bank *v.* Michaud, 62 Minn. 459, 65 N. W. 70 (1895); Whalen *v.* Ruegamer, 123 N. Y. App. Div. 585, 108 N. Y. Supp. 38 (1908); Dunlevie *v.* Spangenberg, 66 N. Y. Misc. 354, 121 N. Y. Supp. 299 (1910); Roger Williams Nat. Bank *v.* Groton Mfg. Co., 16 R. I. 504, 17 Atl. 170 (1889); Wardwell *v.* Williamson, 72 Vt. 183, 47 Atl. 786 (1900).

[64] Thayer *v.* Wendell, 1 Gall. (U. S.) 37 (1812); Glenn *v.* Allison, 58 Md. 527 (1882); Snow & Leather Nat. Bank *v.* Dix, 123 Mass. 148 (1877); Hussey *v.* Arnold, 185 Mass. 202, 70 N. E. 87 (1904) (*semble*); Packard *v.* Kingman, 109 Mich. 497, 67 N. W. 551 (1896) (*semble*); Brackett *v.* Ostrander, 126 N. Y. App. Div. 529, 110 N. Y. Supp. 779 (1908).

[65] Watling *v.* Lewis, [1911] 1 Ch. 414. See also Furnivall *v.* Coombes, 5 M. & G. 736. And see *In re* Robinson's Settlement, 46 L. J. 785 (1911), which was reversed by the Court of Appeal on another ground. S. C. [1912] 1 Ch. 717. *Cf.* Williams *v.* Hathaway, 6 Ch. Div. 544 (1877), where there was a limitation on, but not a total exemption from, personal liability.

[66] *In re* Robinson's Settlement, [1912] 1 Ch. 717, 728. See also 133 L. T. 250.

[67] See cases cited, *supra*, n. 64.

[68] Gisborn *v.* Charter Oak Life Ins. Co., 142 U. S. 326 (1892); Noyes *v.* Blakeman, 6 N. Y. 567 (1852); New *v.* Nicoll, 73 N. Y. 127 (1878) (*semble*); O'Brien *v.* Jackson, 167 N. Y. 31, 33, 60 N. E. 238 (1901) (*semble*); Fowler *v.* Mutual Life Ins. Co., 28 Hun (N. Y.) 195 (1882); Wadsworth, Howland & Co. *v.* Arnold, 24 R. I. 32, 51 Atl. 1041 (1902). See Bushong *v.* Taylor, 82 Mo. 660 (1884). *Cf.* Bank of Topeka *v.* Eaton, 100 Fed. 8 (1900), affirmed S. C. 107 Fed. 1003, 47 C. C. A. 140 (1901).

In four states it is expressly provided by statute that " a trustee is a general agent for the trust property. . . . His acts, within the scope of his authority, bind the trust property to the same extent as the acts of an agent bind his principal." CAL. CIV. CODE, § 2267; MONT. CIV. CODE, § 3020; S. D. CIV. CODE, § 1642; N. D. COMP. LAWS, 1913, § 6305.

right against the estate it is necessary only that the trustee acted properly in incurring the debt.[69]

When, however, the trustee makes a contract for the benefit of the trust estate whereby he does not purport to bind the trust estate, but binds himself, has the creditor any right against the trust estate except through the trustee? In general it is clear that the trust estate is not liable for the contracts[70] or torts[71] of the trustee, although made or committed in the due course of the administration of the trust. But it is held in a few states that if the debt was properly incurred by the trustee and if the estate was enriched thereby, the creditor may recover against the estate to the extent of the enrichment when the trustee is insolvent or is not within the jurisdiction, even though the trustee is in default to the estate and hence has no right of exoneration.[72] The theory on which a recovery is allowed is that unless a recovery is allowed the estate

---

[69] There is another possible theory on which the trust estate may be reached by the creditor, where the trustee has made a contract "as trustee but not otherwise." It might be held that the meaning of the contract is that, although the trustee is to be liable on the contract, the creditor agrees not to levy upon his private assets, but to rely solely on his right to exoneration. On this theory the right of the creditor against the trust estate is not direct, but is derivative, and is dependent upon, and limited to the extent of, the trustee's right to exoneration. See Clack *v.* Holland, 19 Beav. 262 (1854); King *v.* Stowell, 211 Mass. 246, 251, 98 N. E. 91 (1912).

[70] Farhall *v.* Farhall, L. R. 7 Ch. 123 (1871); Taylor *v.* Crook, 136 Ala. 354, 34 So. 905 (1902); Etowah Min. Co. *v.* Wills Valley Min. & Mfg. Co., 143 Ala. 623, 39 So. 336 (1904); Austin *v.* Munro, 47 N. Y. 360 (1872); United States T. Co. *v.* Stanton, 139 N. Y. 531, 34 N. E. 1098 (1893); O'Brien *v.* Jackson, 167 N. Y. 31, 60 N. E. 238 (1901); Mulrein *v.* Smillie, 25 N. Y. App. Div. 135, 48 N. Y. Supp. 994 (1898); Le Baron *v.* Barker, 143 N. Y. App. Div. 492, 127 N. Y. Supp. 979 (1911); Decillis *v.* Mascelli, 152 N. Y. App. Div. 304, 136 N. Y. Supp. 573 (1912).

[71] Moniot *v.* Jackson, 40 N. Y. Misc. 197, 81 N. Y. Supp. 688 (1903); Norling *v.* Allee, 37 N. Y. Sup. Ct. 409, 13 N. Y. Supp. 791 (1891), affirmed 131 N. Y. 622, 30 N. E. 865 (1892); Keating *v.* Stevenson, 21 N. Y. App. Div. 604, 47 N. Y. Supp. 847 (1897); Boyd *v.* U. S. Mortgage & Trust Co., 84 N. Y. App. Div. 466, 82 N. Y. Supp. 1001 (1903); Parmenter *v.* Barstow, 22 R. I. 245, 47 Atl. 365 (1900). But see Ferrier *v.* Trepannier, 24 Can. Sup. Ct. 86 (1895); Ireland *v.* Bowman, 130 Ky. 153, 113 S. W. 56 (1908); Prinz *v.* Lucas, 210 Pa. 620, 60 Atl. 309 (1905).

[72] Wylly *v.* Collins, 9 Ga. 223 (1851); Miller *v.* Smythe, 92 Ga. 154, 18 S. E. 46 (1893); Sanders *v.* Houston Guano, etc. Co., 107 Ga. 49, 32 S. E. 610 (1899); Stillman *v.* Holmes, 9 Oh. N. P. N. S. 193 (1909); Manderson's Appeal, 113 Pa. 631 (1886); Mathews *v.* Stephenson, 6 Pa. 496 (1847); Yerkes *v.* Richards, 170 Pa. 346, 32 Atl. 1089 (1895). *Cf.* Mannix *v.* Purcell, 46 Oh. St. 102, 147, 19 N. E. 572 (1888); Field *v.* Wilbur, 49 Vt. 157 (1876). See also an article by Louis D. Brandeis, Esq., on "Liability of Trust Estates on Contracts made for their Benefit," in 15 AMER. L. REV. 449.

is unjustly enriched. It is true that the defalcation of the trustee may have impoverished the estate, but that is in a separate transaction, for which the creditor is in no way responsible. Although the trustee is not an agent of the *cestui que trust*, he is in a sense an agent of the estate. The situation is therefore different from the case where a bailee makes a contract for the improvement of the thing bailed, in which case the owner cannot be held liable for the incidental benefit.[73] The enrichment of the *cestui que trust* is not merely incidental. As a matter of fact, the creditor frequently looks to the solvency of the estate and gives credit on the faith of it. It is true, he relies also on the trustee, and if the trustee is solvent and within the jurisdiction, it is a wise rule to make the creditor pursue him. But when the remedy against the trustee is unavailing, there is no good reason why the estate should profit at the expense of the creditor. In most jurisdictions, however, a direct right against the estate, based on the prevention of unjust enrichment, is denied; [74] and the creditor's right against the trust estate is dependent on and limited to the extent of the trustee's right to exoneration, and it is necessary in every case to go into the trustee's accounts to ascertain whether he has a right to exoneration, except in the cases where the trustee has expressly mortgaged or pledged, or has expressly charged, the trust estate.

Austin W. Scott.

HARVARD LAW SCHOOL.

[73] Cahill *v.* Hall, 161 Mass. 512, 37 N. E. 573 (1894).

[74] *In re* Johnson, 15 Ch. Div. 548 (1880); *In re* Evans, 34 Ch. Div. 597 (1887); *In re* British Power, etc. Co., [1910] 2 Ch. 470; *In re* Morris, 23 L. R. Ir. 333 (1889); Hewitt *v.* Phelps, 105 U. S. 393 (1881); Dantzler *v.* McInnis, 151 Ala. 293, 44 So. 193 (1907) (*semble*); Mason *v.* Pomeroy, 151 Mass. 164, 24 N. E. 202 (1890) (*semble*); Clopton *v.* Gholson, 53 Miss. 466 (1876); Norton *v.* Phelps, 54 Miss. 467, 471 (1877) (*semble*); Wells-Stone Mercantile Co. *v.* Aultman, Miller & Co., 9 N. D. 520, 84 N. W. 375 (1900) (*semble*). But if the trustee pays the creditor, using, to the creditor's knowledge, funds of the trust estate, the creditor need not refund, although on an accounting the trustee is subsequently proved to be in default to the estate unless at the time of making the payment the trustee was in default to the estate, and the creditor knew that he was in default. *In re* Blundell, 40 Ch. Div. 370 (1888).